BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TIMOTHY DAVENPORT	)	
Claimant	)	
VS.	)	Docket No. 1,057,282
	)	
CITY OF MANHATTAN	)	
Self-Insured Respondent	)	

ORDER

Respondent requested review of Administrative Law Judge Rebecca Sanders' October 31, 2012 Award. The Board heard oral argument on March 13, 2013.

Judge Sanders found that claimant timely filed an application for hearing. Judge Sanders also ruled that claimant sustained a 12% functional impairment based upon an average of the ratings provided by Drs. Bailey, Zimmerman and Prostic.

APPEARANCES

Bruce A. Brumley, of Topeka, Kansas, appeared for the claimant. Kip A. Kubin, of Leawood, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted stipulations listed in the Award.

ISSUES

Respondent argues claimant's application for hearing was not timely filed. Respondent asserts that the calculating of the two-year period should be when the medical care was incurred and not when reimbursement was received. Also, respondent contends that medical mileage is not "compensation" because claimant did not receive any additional value from the payment. Finally, respondent requests the Board adopt the rating of Dr. Zimmerman and find the claimant only sustained a 7% impairment to the whole person. Claimant maintains Judge Sanders' Award should be affirmed.

The issues for the Board's review are:

(1) Did claimant file a timely application for hearing?

(2) Did the court err in determining the nature and extent of disability?

FINDINGS OF FACT

Claimant had a prior work-related neck injury in 2000. Dr. Ebeling performed a cervical discectomy and fusion at C5-6 in 2001. On March 7, 2002, claimant received a settlement based on a 12% permanent partial disability rating to the body as a whole based on the AMA *Guides*[1] (hereinafter *Guides*). Claimant testified that from 2002 until 2008, he experienced some "woodiness" on different fingers, but felt he made a full recovery.

Claimant has worked for respondent as a firefighter/EMT. On April 17, 2008, claimant was on respondent's athletic committee that was selecting work out equipment. Claimant had been working out on various exercise machines and lifting weights for three hours when he felt something wrong in his neck. He had little or no left arm strength. Claimant was seen by Mercy Occupational with complaints of pain in the neck, as well as weakness in his left side, arm and hand. An MRI was performed.

An Employer's Report of Accident dated May 1, 2008, was filed with the Division of Workers Compensation on May 2, 2008.[2]

Respondent referred claimant to Alexander S. Bailey, M.D., a board certified orthopedic surgeon. On June 4, 2008, claimant complained to Dr. Bailey about neck, deltoid, left wrist, and hand pain, as well as left hand numbness. Dr. Bailey noted the MRI showed severe degenerative disc disease, varying levels of spinal stenosis C2 through C6 with C7-T1 left large herniated nucleus pulposus.

Dr. Bailey administered injections, but they failed to provide much relief. Dr. Bailey performed an anterior cervical discectomy and fusion at C7-T1 on October 14, 2008. Claimant treated with Dr. Bailey until being released to regular duty on January 14, 2009. In his April 8, 2009 report, Dr. Bailey provided a 15% permanent partial impairment to the body as a whole based upon the *Guides*, but only attributed 7.5% permanent partial impairment to the body as a whole as due to the April 17, 2008 accident.

The last payment made by respondent was a check sent to claimant on or about November 11, 2010 as reimbursement for medical mileage and turnpike reimbursement for his trip to Dr. Bailey on January 14, 2009.[3] Claimant received such check at some undetermined time in November 2010.

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[1] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[2] R.H. Trans. at 7-8, Resp. Ex. B. The Board takes notice of Division records showing that the May 1, 2008 report was received by the Division on May 2, 2008.

[3] R.H. Trans., Cl. Ex. 1 at 1.

Claimant filed an application for hearing with the Division of Workers Compensation on August 19, 2011.

On September 30, 2011, claimant was evaluated by Daniel D. Zimmerman, M.D., at the request of his attorney. Dr. Zimmerman is board certified in internal medicine, as well as certified as an independent medical examiner. Claimant complained of neck pain, decreased range of motion of the cervical spine, and numbness, tingling and strength loss in his left hand. Dr. Zimmerman provided an overall 35% permanent partial impairment rating to the body as a whole, but indicated a 9% impairment rating was preexisting. Therefore, Dr. Zimmerman assigned a 26% permanent partial impairment to the body as a whole pursuant to the *Guides* for the April 17, 2008 accident.

Claimant was re-evaluated by Dr. Zimmerman on July 3, 2012. Dr. Zimmerman altered his prior rating and provided an overall 25% permanent partial impairment to the body as a whole pursuant to Table 73 on page 3/110 of the *Guides*, with the April 17, 2008 accidental injury resulting in a 13% permanent partial impairment to the body as a whole. Alternatively, Dr. Zimmerman opined that if using the Range of Motion Model, claimant's permanent partial impairment would be 19% to the body as a whole pursuant to the *Guides*, with the April 17, 2008 accidental injury resulting in a 7% permanent partial impairment to the body as a whole. The reductions in the ratings were based on the possibility that claimant's prior settlement, which was based on a 12% permanent partial impairment to the body as a whole, might be determinative of his preexisting impairment.

On July 16, 2012, claimant was evaluated by Edward J. Prostic, M.D., at the request of his attorney. Dr. Prostic is a board certified orthopedic surgeon, as well as certified as an independent medical examiner. Claimant made similar complaints as he had given Dr. Zimmerman. Dr. Prostic provided an overall rating of 30% to the body as a whole using the *Guides*, but concluded claimant only had a 15% impairment rating to the body as a whole due to the April 17, 2008 accidental injury, also pursuant to the *Guides*.

The regular hearing was held June 28, 2012. Claimant testified he suffered some loss of sensation and loss of strength since the 2008 accident. Claimant testified he is worse now as he was able to "road bike" after the 2000 accident, but can no longer do such activity. Claimant testified that he waited to file the application for hearing because he is a procrastinator and did not know there was any time deadline for filing.

As noted above, Judge Sanders concluded claimant's receipt of medical mileage reimbursement on November 11, 2010 was medical compensation. Judge Sanders relied on prior Board decisions indicating that medical mileage was medical compensation. She also noted that K.S.A. 44-534(b) concerns filing an application for hearing within two years from the last payment of compensation, not when the respondent's duty to issue payment for medical compensation was incurred. Judge Sanders also awarded claimant permanent partial disability benefits based on a split of the impairment ratings amounting to 12% to the body as a whole.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-510h(a) provides:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

The regulation designed to implement the foregoing statutory language provides:

> 51-9-11. Transportation to obtain medical treatment. (a) It shall be the duty of the employer to provide transportation to obtain medical services to and from the home of the injured employee whether those services are outside the community in which the employee resides or within the community.
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> (b) The employer shall reimburse the worker for the reasonable cost of transportation under the following conditions: (1) if an injured worker does not have a vehicle or reasonable access to a vehicle of a family member living in the worker's home; or (2) if the worker, because of the worker's physical condition, cannot drive and must therefore hire transportation to obtain medical treatment. Reimbursement may include, among other things, reimbursement for the cost of taxi service, other public transportation, and ambulance service, if required by a physician, and for the cost of hiring another individual to drive the worker for medical treatment. Any charges presented to the employer or insurance carrier for payment shall be a fair and reasonable amount based on the customary charges for those services.
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> (c) If an injured worker drives that worker's own vehicle or drives, or is driven in, a vehicle of a family member living in the home of the worker, and if any round trip exceeds five miles, the respondent and insurance carrier shall reimburse the worker for an amount comparable to the mileage expenses provided in K.S.A. 44-515.
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> (d) In any dispute in regard to charges for mileage expenses, and on application by any party to the proceedings, the reasonable cost of transportation shall be determined by a hearing before a workers compensation administrative law judge.

K.S.A. 44-534(b) states:

> No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

Furnishing medical care to a claimant is the equivalent of the payment of compensation.[4] The Board has issued differing decisions regarding whether payment of medical mileage is compensation. In *Wirth*,[5] *McDonald*[6] and *Escalante*,[7] the Board concluded medical mileage reimbursement should be treated as medical compensation for the purpose of assessing penalties. In *Wirth*, the Board stated:

> The Board concludes that . . . mileage incurred to obtain authorized medical treatment is clearly a medical expense. Therefore, for purposes of the penalty statute such mileage reimbursement should be treated as medical compensation. And as previously noted, K.S.A. 44-512a provides that penalties can be assessed for late payment of medical compensation.

However, in *Holmes*,[8] the Board stated:

> The Appeals Board agrees, however, with the argument made by claimant that medical mileage is a reimbursement, not a form of compensation. The mileage rate is determined annually pursuant to K.S.A. 75-3203a. The rate is fixed based upon a determination of the costs of travel. For this reason the Appeals Board considers the mileage provisions to be a reimbursement for expenses, not a compensation right which accrues on the date of accident.

The Board characterized medical mileage reimbursement as a "medical expense" in *Campos*[9] and as a "reimbursement" in *Crider.*[10]

ANALYSIS

Whether claimant timely filed his application for hearing leads to a two-fold inquiry: (1) is medical mileage considered medical compensation; and (2) if so, what is the date of the last payment of compensation, the date mileage is incurred or when it is actually paid?

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[4] *Riedel v. Gage Plumbing and Heating Co. Inc.*, 202 Kan. 538, 539, 449 P.2d 521 (1969).

[5] *Wirth v. Via Christi Regional Medical Ctr.*, No. 270,139, 2004 WL 2382715 (Kan. WCAB Sep. 30, 2004).

[6] *McDonald v. State of Kansas*, No. 1,052,500, 2011 WL 6122920 (Kan. WCAB Nov. 9, 2011).

[7] *Escalante v. Creekstone Farms Premium Beef*, Nos. 1,019,213 & 1,021,888, 2008 WL 4149958 (Kan WCAB Aug. 27, 2008).

[8] *Holmes v. Medicalodges, Inc.*, No. 211,917, 1997 WL 162032 (Kan. WCAB Mar. 27, 1997).

[9] *Campos v. Western Plains Regional Hospital*, No. 205,604, 2000 WL 1929331 (Kan. WCAB Dec. 19, 2000).

[10] *Crider v. Eaton Corporation*, No. 250,068, 2001 WL 893593 (Kan. WCAB July 30, 2001).

Is payment of medical mileage compensation?

The Kansas Court of Appeals stated in *Hedrick:*[11]

> U.S.D. No. 259 has cited no previous cases which define "medical treatment" as used in our workers compensation statute, and we have been unable to find any (Hedrick did not file a brief on appeal). Black's Law Dictionary 1502 (6th ed.1990) does provide a definition of "treatment": "A broad term covering all the steps taken to effect a cure of an injury or disease; including examination and diagnosis as well as application of remedies." Additionally, **the legislature has provided an operative definition of medical treatment in the statute, by delineating specific items which that term includes:** "nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus," and **transportation to obtain medical treatment. K.S.A. 44-510(a).** Finally, the regulations promulgated by the Division of Workers Compensation do not define medical treatment, although they do define "apparatus" as "glasses, teeth, or artificial member," K.A.R. 51-9-2, and establish criteria for reimbursement of expenses for transportation to obtain medical treatment, K.A.R. 51-9-11.(emphasis added)[12]

Employer-provided transportation includes reimbursing a claimant for mileage or tolls. *Hedrick* indicates that transportation for medical treatment is under the statutory definition (now K.S.A. 44-501h) of medical treatment. As noted in *Riedel*, providing medical treatment is medical compensation. The Board concludes that payment of medical mileage is payment of medical treatment and is thus payment of compensation.

Ridgway,[13] cited by respondent as dispositive, discusses the definition of "compensation" with respect to average weekly wage. In Ridgway, compensation was defined as a real economic gain, as opposed to expense reimbursement. In *Ridgway*, a monthly car allowance was a real economic gain for the claimant, as he pocketed the money (which he characterized as "gravy"), and properly included in calculating his wage. However, he failed to prove that a uniform cleaning allowance was used for anything other than maintaining a clean uniform, such that no economic gain was established. The uniform allowance was not included in computing his wage.[14]

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[11] *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997).

[12] *Id.* at 785-86.

[13] *Ridgway v. Board of Ford County Commissioners*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev. denied* 242 Kan. 903 (1988).

[14] *Id.* at 444-45. See also *Jordan v. Pyle, Inc.*, 33 Kan. App. 2d 258, 274-75, 101 P.3d 239 (2004), *rev. denied* 279 Kan. 1006 (2005).

Ridgway only concerns computation of a claimant's average weekly wage. Applying the *Ridgway* definition of what constitutes compensation (for the limited purpose of computing average weekly wage) to define medical compensation is mixing apples and oranges. *Ridgway* does not concern the definition of medical treatment or medical compensation. K.S.A. 44-510h already addresses the definition of medical treatment. Furnishing medical treatment is the same as medical compensation, as found in *Riedel*. Therefore, medical compensation includes transportation associated with medical treatment. Such transportation includes the payment of medical mileage.

Applying the *Ridgway* definition of compensation as only addressing real economic gains results in illogical results. When a respondent pays for medical treatment, whether a hospital bill or a doctor's charges, there is no real economic gain to the claimant, yet such payment is unquestionably the payment of compensation. Using the *Ridgway* definition of what is compensation (for purposes of computing average weekly wage) to define medical compensation would result in medical payments never being payment of compensation.

As noted above, he Board concludes that the payment for medical mileage was compensation.

If medical mileage is compensation, what date is the last payment of compensation that triggers the running of the two year limitation under K.S.A. 44-534?

Sparks[15] states:

> [I]n determining whether medical care is "compensation" under the act neither the fact nor time of payment of the bills is determinative; the issue is whether the medical care was authorized, either expressly or by reasonable implication. If the claimant receives medical care with the reasonable expectation of payment by the employer the care is "compensation" when rendered even though it may never be paid for.[16]

Under *Sparks*, the timing of the payment, if ever, is irrelevant to determining whether a statute of limitations to file written claim has started to run. The written claim statute, K.S.A. 44-520a, is similar to K.S.A. 44-534, in the sense that both contemplate time deadlines after a "last payment of compensation." *Sparks* indicates that the time begins to run when medical care is rendered, assuming claimant had a reasonable expectation of payment by the employer.

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[15] *Sparks v. Wichita White Truck Trailer Center, Inc.*, 7 Kan. App. 2d 383, 642 P.2d 574 (1982).

[16] *Id.* at 385-86.

Despite the *Sparks* analysis concerning whether a claimant has a reasonable expectation of medical payment, the Board need only apply the law as written.[17] The Kansas Workers Compensation Act says nothing about a reasonable expectation of medical payment. Rather, the Act focuses on a two-year window of opportunity for a claimant to file an application for hearing after "the last payment of compensation." Respondent's last payment of compensation was on or after November 11, 2010, when respondent paid for the medical mileage claimant incurred on January 14, 2009. Claimant filed his application for hearing on August 19, 2011, which was within two years after the last payment of compensation. Claimant's application for hearing was timely filed.

What is the nature and extent of claimant's disability?

The Board affirms and adopts Judge Sanders' findings regarding claimant's percentage of functional impairment. Claimant's April 17, 2008 accidental injury resulted in him having a 12% permanent partial disability to the body as a whole.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

AWARD

WHEREFORE, the Board affirms Administrative Law Judge Rebecca Sanders' October 31, 2012 Award.

IT IS SO ORDERED.

Dated this _____ day of April, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

[17] See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 608, 214 P.3d 676 (2009).

DISSENT

The undersigned Board Member respectfully dissents from the majority decision. *Ridgway*[18] is controlling. "Compensation" is a real economic gain, as opposed to a mere reimbursement. This Board Member sees no reason to define compensation differently for various purposes within the Kansas Workers Compensation Act.

Other areas of the law are instructive regarding whether mileage should be viewed as compensation. Mileage incurred by jurors is based on K.S.A. 75-3203a, which refers to payment for mileage as an "allowance" reflecting the "actual cost incurred in using" a vehicle.[19] Similarly, mileage rates set by the IRS are based on the cost of operating an automobile. Getting reimbursed for the cost of operating a vehicle, absent proof to the contrary, results in no positive or real economic gain to a claimant. Therefore, if there is no proof of real economic gain, medical mileage should not be considered to be compensation.

Claimant was simply reimbursed for his medical mileage. He did not prove real economic gain. *Ridgway* dictates that a lack of proof results in the claimant having failed to prove that receipt of money is compensation. Therefore, the payment for the medical mileage should not be considered a payment of compensation.

While respondent has the burden to provide transportation under K.S.A. 44-501h, it may also simply reimburse a claimant for medical mileage. While *Hedrick* indicates that providing transportation is medical treatment, the case does not comment on whether reimbursing a claimant for miles incurred to and from a medical appointment, using his or her own automobile, is payment of compensation. Providing transportation should not be confused with reimbursing a claimant for medical mileage. Reimbursement for medical mileage, absent proof to the contrary, provides no real economic gain as it is simply a return of the cost of travel. As such, claimant's medical mileage reimbursement, at least based on the evidence in this case, did not result in a real economic gain and is not compensation.

This Board Member concludes claimant's receipt of medical mileage reimbursement resulted in no economic gain. The medical mileage reimbursement was not a payment of compensation. Respondent last provided payment of medical compensation when claimant was discharged by Dr. Bailey on January 14, 2009. Claimant filed his application for hearing on August 19, 2011, just over seven months after the two year deadline for

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[18] *Ridgway v. Board of Ford County Commissioners*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev. denied* 242 Kan. 903 (1988).

[19] K.S.A. 75-3203a.

filing after the last payment of compensation expired. Therefore, claimant's application for hearing was filed out of time.

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